(3)

No. 95-559

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DOCTOR'S ASSOCIATES, INC. and NICK LOMBARDI,
Petitioners,
v.
PAUL CASAROTTO, ET UX.,
Respondents.

On Writ of Certiorari to the Supreme Court of Montana

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 2, 1995
CERTIORARI GRANTED JANUARY 5, 1996

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MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

No. BDV-92-860

PAUL CASAROTTO and PAMELA CASAROTTO,
Plaintiffs,

v.

DANIEL L. HUDSON, *et al.*,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	No.	PROCEEDINGS
9/14/92	1	Verified Complaint—Henry R. Crane, Tawney & Dayton—P.O. Box 3658, Missoula MT 59806 —See #49 Summons—Issued—
9/22/92	2	Summons Retd (9/18/92)
10/05/92	3	Stipulation (3 Defts)—Jack L. Lewis (Atty) —Jardine, Stephenson, Blewett & Weaver— Henry R. Crane—(Atty)—Tawney & Dayton —P.O. Box 3658—Missoula, MT. 59806—542-5000
10/06/92	4	Order (0/that Defts have until 11/2/92 within which to appear)
10/29/92	5	Fax copy of the Amended Verified Complaint
11/04/92	6	Amended Verified Complaint Summons—issd—(for Nick Lombardi & Doctor's Associates, Inc.)
11/09/92	7	Stip for Extension of time
11/09/92	8	Certificate of Mailing
11/10/92	9	Order (0/that Defts. Daniel L. & Deb Hudson & D&D Subway, have until 12/11/92 to respond to Pltfs' First Disc requests to Defts)

DATE	No.	PROCEEDINGS
11/12/92	10	Defts Daniel L. Hudson, Deb Hudson & D&D Subway Corp's mot for more definite statement & Memorandum in support
11/18/92	11	Stip for extension of time
11/18/92	12	Order (0/that Pltfs. Paul & Pamela Casarotto have until 12/21/92 to respond)
11/23/92	13	Response to Defts Mot for more definite statement & memorandum in sprt
12/08/92	14	Reply memo in supp of mot for more definite statement
12/31/92	15	Summons rtnd (12/8/92 Nick Lombarki)
1/06/93	16	Summons retd (Nick Lombardi (—))
1/06/93	17	Return of serv of summons & complaint by Doctor's Associates, Inc. (12/22/92)
1/29/93	18	Defts Doctor's Associates, Inc.'s & Nick Lombardi's mot to dismiss, or, in the alternative, to stay the proceedings pending arbitration L.D. Nybo (Atty)— Conklin, Nybo, Leveque & Murphy— Alan G. Schwartz & Isabel Chenoweth (Attys) Wiggin & Dana— One Century Tower—New Haven, CT 06508—
1/29/93	19	Memo of law in supp of defts' Doctor's Assoc. Inc., & Nick Lombardi's mot to dismiss, or, in the alternative, to stay the proceedings pending arbitration
2/12/93	20	Memo of law in opposition to defts' Doctor's Associates, Inc. & Nick Lombardi's motion to dismiss, or, in the alternative, to stay the proceedings pending arbitration
2/17/93	21	Motion for extension of time
2/17/93	22	Order (O/that defts Doctor's Assoc & Lombardi have until 2/26/93 which to file their reply)

DATE	No.	PROCEEDINGS
2/26/93	23	Reply memo of law in supp of defts' Doctors Associates, Inc. & Nick Lombardi's mot to dismiss, or in the alternative, to stay pending arbitration
3/05/93	24	Application for hearing (Pltf's)
3/05/93	25	Mot for special admission of out-of-state counsel
4/01/93	26	Order (Hrg set for 5/26/93 @ 10:00 A.M.)
4/21/93	27	Application for Hrg
5/25/93		Subp. Duces Tecum—Issued—Deft Hudson 1 —Norwest Bank
5/26/93		Hrg Re: Mot to dismiss: Crt (McCarvel) rules in favor of defts, Drs. Associates & Nick Lombardi and stays the proceedings until arbitration is completed. (Heiman)
5/26/93	28	Stip for protective order
6/01/93	29	Protective order (see order for details)
6/02/93	30	Order (ordered and adjudged that pltfs' claims against the defts Doctor's Associates, Inc., and Nick Lombardi are hereby stayed until the arbitration has been had in accordance with the terms of the arbitration agreement)
6/14/93	31	Motion for reconsideration or to partially lift stay
6/14/93	32	Memo of law in supp of pltfs' mot for reconsideration or to alter/amend order
6/24/93	33	Memo of law of defts Doctor's Associates, Inc. and Nick Lombardi in opposition to pltfs' mot for reconsideration or to alter/amend order
7/02/93	34	Notice of Appeal
7/07/93	35	Mot & brief for entry of rule 54(B) order certifying this court's June 2, 1993 order appealable to the Montana Supreme Court

DATE	No.	PROCEEDINGS
7/08/93	36	Rule 54(B) order (O/that court certifies that the 6/2/93 order is a final judgment pursuant to rule 54(B) as to the following issues: see order)
8/13/93	37	Mot for extention of time to transmit record and brief in supp thereof
8/16/93	38	Order extending time to transmit record (O/ that ptlfs are granted to 9/30/93 to transmit the record on appeal herein)
8/18/93	39	Answer to amended verified complaint. Counterclaims and set-off (Daniel L. and Deb Hudson and D&D Subway Corp)
8/24/93	40	Stip to withdraw mot for more definite statement and application for Hrg
8/24/93	41	Order (O/that mot of defts Daniel L. and Deb Hudson & D&D Subway Corp for a more definite statement is withdrawn . . .)
8/26/93	42	Reply to counterclaim & set off
8/26/93	43	Certificate of service
9/02/93		Subp. duces tecum—ISS—(Nick Lombardi)
9/03/93	44	Certificate of service
9/28/93		—File transmitted to Supreme Court by cert mail # P 674 330 301—
10/07/93	45	Sub/duc/tec retd (1-pltf) (Nick Lombardi)
10/18/93	46	Mot for protective order & sprting brief of deft Lombardi
10/26/93	47	Cert of mailing
10/27/93	48	Stip re: deft Lombardi's mot for protective order
2/22/94	49	Notice of change of address—Grant D. Parker (atty for pltf)—Mullendore, Tawney & Watt

DATE	No.	PROCEEDINGS
		—310 West Spruce, Missoula 59802—542-5000 —and Peter Michael Meloy (atty)—Meloy Law Firm—Box 1244, Helena 59601—442-2442—
1/10/95	50	Remittitur & opinion from the Supreme Court (judgment is reversed and remanded)—No final jdgmt yet—called NYBO and he said there is no final jdgmt yet—
1/12/95	51	Receipt of remittitur
1/24/95	52	Supreme Court appeal checklist
3/21/95	53	Request for statement of claim (defts)
3/30/95	54	Response to request for statement of claim (pltfs)
9/20/95	55	Remittitur & opinion from the Supreme Court (on remand and reconsideration. It is now here ordered and adjudged that this court's opinion issd Dec. 15, 1994 is reaffirmed & reinstated)

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. 93-488

PAUL CASAROTTO and PAMELA CASAROTTO,
Plaintiffs and Appellants,

vs

DANIEL L. and DEB HUDSON,
D&D SUBWAY CORPORATION, NICK LOMBARDI,
and DOCTOR'S ASSOCIATES, INC.,
Defendants and Respondents.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
09/29/93	District Court record filed. (2 manilla folders; orig. & two copies of Transcript.
10/26/93	Order granting appellant until Nov. 26, 1993, to file brief.
11/26/93	Appellant's brief filed. (returned for addendum)
12/02/93	Appellant's brief received back.
12/17/93	Order granting respondents until Jan. 14, 1994, to file brief.
12/23/93	Motion for Admission of Out-of-State Counsel. Sent to Court.
12/23/93	ORDER: That attorneys Ian E. Bjorkman and Alan G. Schwartz be and are hereby admitted to practice before the Supreme Court of the State of Montana, for purposes of this case only, as co-counsel, representing the defendants-respondents Doctor's Associates, Inc., and Nick Lombardi.

DATE	PROCEEDINGS
01/14/94	Respondent's brief, with separate Appendix, filed. (Nick Lombardi and Doctor's Associates, Inc.)
01/25/94	Order granting appellant until Feb. 8, 1994, to file reply brief.
02/08/94	Reply brief filed.
02/09/94	SENT TO COURT.
02/17/94	Order; Classified for submission for oral argument before the Court sitting en banc. That counsel for all parties in this appeal are hereby directed to specifically address in oral argument the issue of preemption in the following United States Supreme Court case: *Volt Information Sciences, Inc. vs. Board of Trustees of the Leland Stanford Junior University* (1989), 489 U.S. 468, 103 L.Ed.2d 488, 109 S.Ct. 1248. The Court will consider receiving amicus curiae briefs relative to this cause.
02/22/94	Notice of change of address. (Parker, Mullendore, Tawney & Watt)
03/04/94	Oral argument set for April 15, 1994 at 10:30 am. (Held at U. of M. Law School).
03/11/94	Order granting the Montana Trial Lawyers Assoc. leave to file an Amicus Curiae Brief. The brief shall be filed no later than the 8th day of April, 1994. (no env.)
03/15/94	Letter from President of Montana Defense Trial Lawyers, Inc. (will not seek leave to file an amicus brief)
03/16/94	Order that Doctor's Assoc. and Lombardi are hereby permitted to file a reply brief by March 28, 1994.
03/28/94	Reply brief filed. COPIES TO COURT.

DATE	PROCEEDINGS
03/28/94	Order granting appellants until April 8, 1994, to file a brief, not to exceed 10 pages, addressing the applicability of *Volt Info. Services v. Leland Stanford Junior University.*
04/01/94	Motion of Amici Curiae International Franchise Assoc. Securities Industry Assoc. copies to Court.
04/05/94	Order; the motion of amici curiae for leave to file an amici curiae brief is granted, and the clerk is directed to file the amici brief submitted with the motion for leave to file. Amicus brief filed. (International Franchise Assoc. & Snap-On)
04/08/94	Reply brief filed. SENT TO COURT.
04/08/94	Amicus Curiae Brief of Montana Trial Lawyers Assoc. Copies to Court.
04/15/94	Oral argument presented. Grant D. Parker argued for the appellant and Alan G. Schwartz argued for the respondent. Taken under advisement at 11:53 a.m.
08/02/94	Motion for leave to file notice of supplemental authority.
08/16/94	Order; that appellants' motion for leave to file supplemental authority is GRANTED.
12/15/95	Opinion; Justice Trieweiler; reversed and remanded; Harrison; Hunt and Nelson concur. Justice Trieweiler specially concurs; Justice Weber dissents. Chief Justice Turnage dissents. Justice Gray dissents.
01/03/95	Remittitur issued. District court record returned.
CLOSED	
06/14/95	US Supreme Court Writ of Certiorari is granted. Judgment vacated and case remanded to MT Supreme Court for consideration in light of Terminix v. Dobson, 513 U.S. (1995).

DATE	PROCEEDINGS
07/17/95	US Supreme Court order granting the petition for writ of certiorari; certified copy of the mandate of the Court and copy of the opinion cited in the judgment filed. Sent to Court.
08/31/95	OPINION: Trieweiler; Reaffirmed and reinstated December 15, 1994 opinion; Nelson, Hunt, Leaphart, concur; Leaphart specially concurs, Gray dissented with Turnage and Weber joining in dissent.
09/19/95	Remittitur issued. (No district court record to return)
CLOSED	

[Filed Jun. 2, 1993]

MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

No. BDV-92-860

PAUL CASAROTTO and PAMELA CASAROTTO,
Plaintiffs,

vs.

DANIEL L. and DEB HUDSON,
D&D SUBWAY CORPORATION, NICK LOMBARDI,
and DOCTOR'S ASSOCIATES, INC.,
Defendants.

ORDER

This cause is before the Court on the defendants Doctor's Associates, Inc. ("DAI") and Nick Lombardi's motion to dismiss, or in the alternative, to stay pending arbitration. The Court having considered the briefs, the argument of counsel and the evidence submitted, rules as follows:

1. The plaintiff Paul Casarotto (the "franchisee") and DAI entered into a franchise agreement dated April 25, 1988 that concerned interstate commerce. DAI is the national franchisor of "Subway" sandwich shops and the franchise agreement permits, *inter alia*, the franchisee a license to use the nationally-known and federally-registered "Subway" trademark.

2. The franchise agreement contained a clause requiring that:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial

> Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. The cost of such a proceeding will be borne equally by the parties.

3. The claims asserted by the plaintiffs against defendants DAI and its alleged agent Lombardi arise out of and relate to the franchise agreement and are therefore encompassed by the arbitration clause and referable to arbitration.

4. The Federal Arbitration Act requires that if an action is brought upon any issue referable to arbitration under the terms of an arbitration agreement, the suit shall be stayed "until such arbitration has been had in accordance with the terms of the agreement. . . ." 9 U.S.C. § 3. *See also, e.g., Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983); *Downey v. Christensen*, 825 P.2d 557, 559 (Mont. 1992).

5. DAI has demanded arbitration of the plaintiffs' claims under the rules of the American Arbitration Association.

Accordingly, it is ordered and adjudged that plaintiffs' claims against the defendants Doctor's Associates, Inc., and Nick Lombardi are hereby stayed until the arbitration has been had in accordance with the terms of the arbitration agreement.

DONE and ORDERED this 2nd day of June, 1993.

/s/ John M. McCarvel
District Judge

[Filed Dec. 15, 1994]

IN THE SUPREME COURT
OF THE STATE OF MONTANA
1994

No. 93-488

PAUL CASAROTTO and PAMELA CASAROTTO,
Plaintiffs and Appellants,

v.

NICK LOMBARDI and DOCTOR'S ASSOCIATES, INC.,
Defendants and Respondents,

and

DANIEL L. and DEB HUDSON, and
D&D SUBWAY CORPORATION,
Defendants.

Appeal from District Court of the Eighth Judicial District,
In and for the County of Cascade,
The Honorable John M. McCarvel, Judge presiding

Submitted: April 19, 1994

Decided: December 15, 1994

Justice Terry N. Trieweiler delivered the opinion of the Court.

Plaintiffs Paul and Pamela Casarotto filed this suit in the District Court for the Eighth Judicial District in

Cascade County to recover damages which they claim were caused by the defendants' breach of contract and tortious conduct. Defendants Nick Lombardi and Doctor's Associates, Inc. (DAI), moved the District Court for an order dismissing plaintiffs' complaint, or in the alternative, staying further judicial proceedings pending arbitration of plaintiffs' claims pursuant to a provision in DAI's franchise agreement with plaintiffs which required that disputes "arising out of or relating to" that contract be settled by arbitration. The District Court granted defendants' motion, and ordered that further judicial proceedings be stayed until arbitration proceedings were completed in accordance with the terms of the parties' agreement. Plaintiffs appeal from that order. We reverse the order of the District Court.

The issues raised on appeal are:

1. Based on conflict of law principles, is the franchise agreement entered into between the Casarottos and DAI governed by Connecticut law or Montana law?

2. If the contract is governed by Montana law, is the notice requirement in § 27-5-114(4), MCA, of Montana's Uniform Arbitration Act, preempted by the Federal Arbitration Act found at 9 U.S.C. §§ 1-15 (1988)?

FACTUAL BACKGROUND

On October 29, 1992, Paul and Pamela Casarotto filed an amended complaint naming Doctor's Associates, Inc., and Nick Lombardi as defendants. For purposes of our review of the District Court's order, we presume the facts alleged in the complaint to be true.

DAI is a Connecticut corporation which owns Subway Sandwich Shop franchises, and Lombardi is their development agent in Montana. The Casarottos entered into a franchise agreement with DAI which allowed them to open a Subway Sandwich Shop in Great Falls, Montana.

However, they were told by Lombardi that their first choice for a location in Great Falls was unavailable.

According to their complaint, the Casarottos agreed to open a shop at a less desirable location, based on a verbal agreement with Lombardi that when their preferred location became available, they would have the exclusive right to open a store at that location. Contrary to that agreement, the preferred location was subsequently awarded by Lombardi and DAI to another franchisee. As a result, the Casarottos' business suffered irreparably, and they lost their business, along with the collateral which secured their SBA loan.

This action is based on the Casarottos' allegation that Lombardi and DAI breached their agreement with the Casarottos, defrauded them, breached the covenant of good faith and fair dealing, and engaged in other tortious conduct, all of which directly caused the Casarottos loss of business and the resulting damage.

DAI's franchise agreement with the Casarottos was executed on April 25, 1988. There was no indication on the first page of the contract that it was subject to arbitration. However, paragraph 10(c) of the contract, found on page 9, included the following provision:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. The cost of such a proceeding will be born equally by the parties.

On January 29, 1993, DAI moved the District Court to dismiss the Casarottos' complaint, or at least stay further judicial proceedings, pending arbitration pursuant to paragraph 10(c) of the franchise agreement. DAI alleged that the franchise agreement affected interstate commerce, and therefore, was subject to the Federal Arbitration Act found at 9 U.S.C. §§ 1-15 (1988). They sought a stay of proceedings pursuant to § 3 of that Act, which provides in relevant part that:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . .

DAI claimed that Montana law could not be raised as a bar to enforcement of the arbitration provision for two reasons: First, the contract specifically called for the application of Connecticut law; and second, Montana law was preempted by the Federal Arbitration Act.

The Casarottos opposed DAI's motion on the grounds that Montana law applied, in spite of the choice of law provision in the contract, and that based on § 27-5-114 (4), MCA, the contract's arbitration provision was unenforceable because DAI had not provided notice on the first page of the agreement that the contract was subject to arbitration.

On June 2, 1993, the District Court issued its order granting DAI's motion to stay further judicial proceedings pursuant to 9 U.S.C. § 3. The order was made applicable to both DAI and Lombardi, but not to other named defendants who were not parties to the franchise agreement and whose alleged conduct raises other issues.

On July 8, 1993, the District Court issued an order pursuant to Rule 54(b), M.R.Civ.P., certifying its June 2 order as final for purposes of appeal. The Casarottos appeal from that order.

ISSUE 1

Based on conflict of law principles, is the franchise agreement entered into between the Casarottos and DAI governed by Connecticut law or Montana law?

Paragraph 12 of the franchise agreement entered into between the parties provides as follows: "This agreement shall be governed by and construed in accordance with the laws of the State of Connecticut and contains the entire understanding of the parties." DAI contends that, therefore, Connecticut law governs our interpretation of the contract and that since Connecticut law is identical to the Federal Arbitration Act *see* Conn. Gen. Stat. § 52-409 (1993), conspicuous notice that the contract was subject to arbitration was not required and we need not concern ourselves with the issue of whether Montana law is preempted.

The Casarottos respond that the issue of whether to apply Connecticut or Montana law involves a conflict of law issue and that the answer can be found in our prior decisions. We agree.

In *Emerson v. Boyd* (1991), 247 Mont. 241, 805 P.2d 587, we cited with approval the Ninth Circuit's decision in *R.J. Williams Co. v. Fort Belknap Housing Authority* (9th Cir. 1983), 719 F.2d 979, which adopted the criteria established in Restatement (Second) of Conflict of Laws § 188 (1971) to determine which jurisdiction's laws apply to a contract where no choice of law is provided for in the contract. Section 188 provides as follows:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

> (2) In the absence of an effective choice of law by the parties (see § 187), the context to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.
>
> These contracts are to be evaluated according to their relative importance with respect to the particular issue.
>
> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

In this case, there is a choice of law provision in the parties' contract. The question is whether it was an "effective" choice. We recently held in *Youngblood v. American States Ins. Co.* (1993), 262 Mont. 391, 394, 866 P.2d 203, 205, that this State's public policy will ultimately determine whether choice of law provisions in contracts are "effective." In that case, we stated:

> Here, the general policy language in the insurance contract requires American States to pay whatever damages are required in Montana; that is, the contract is to be performed in Montana. Therefore, unless a contract term provides otherwise, *Kemp* [*v. Allstate Ins. Co. (1979), 183 Mont. 526, 601 P.2d 20*] and § 28-3-102, MCA, require the application of Montana law because the contract was to be 'per-

formed' in Montana. In this case, however, the insurance contract contains a choice of law provision which requires the application of Oregon subrogation law. . . .

. . . .

. . . [T]he choice of law provision will be enforced unless enforcement of the contract provision requiring application of Oregon law as regards subrogation of medical payments violates Montana's public policy or is against good morals.

Youngblood, 866 P.2d at 205.

Based on our conclusion in that case that subrogation of medical payment benefits was contrary to our public policy, we held that:

> [T]he choice of law provision in the insurance contract would result in medical payment subrogation under Oregon law. Because such subrogation violates Montana's public policy, that term of the insurance contract at issue here is not enforceable.

Youngblood, 866 P.2d at 208.

Restatement (Second) of Conflict of Laws § 187(2) (1971) is consistent with our decision in *Youngblood*, and expands upon the factors to be considered under the circumstances in this case. It provides that:

> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Adopting § 187, then, as our guide, we first look to § 188 to determine whether Montana law would be applicable absent an "effective" choice of law by the parties.

According to the affidavit of Paul Casarotto filed in opposition to DAI's motion to dismiss, he executed the contract in neither Connecticut nor Montana. It was executed while he was traveling in New York. However, it appears from that same affidavit, and from the allegations in the complaint, that original negotiations were conducted by him in Great Falls, the contract was to be performed in Great Falls, the subject matter of the contract (the Subway Sandwich Shop) was located in Great Falls, and that he and Pamela Casarotto resided in Great Falls at the time that the contract was executed. The only connection to Connecticut was that DAI was incorporated in that state and apparently had its home office in that state at the time of the parties' agreement. We conclude that based upon the application of the criteria set forth in § 188, and our prior decision in *Emerson*, Montana has a materially greater interest than Connecticut in the contract issue that is presented, and that absent an "effective" choice of law by the parties, Montana law would apply.

Our remaining inquiry, then, is whether application of Connecticut law would be contrary to a fundamental policy of this State by eliminating the requirement that notice be provided when a contract is subject to arbitration.

In *Trammel v. Brotherhood of Locomotive Firemen and Enginemen* (1953), 126 Mont. 400, 409, 253 P.2d 329, 334, we held that the public policy of a state is established by its express legislative enactments. Here, the legislative history for § 27-5-114(4), MCA, makes clear that the legislative committee members considering adoption of the Uniform Arbitration Act had two primary concerns. First, they did not want Montanans to waive their constitutional right of access to Montana's courts unknowingly, and second, they were concerned about Montanans being compelled to arbitrate disputes at distant locations beyond the borders of our State.

The facts in this case, and our recent decision in another case, justify those concerns.

Regardless of the amount in controversy between these parties, the arbitration clause in the Subway Sandwich Shop Franchise Agreement requires that the Casarottos travel thousands of miles to Connecticut to have their dispute arbitrated. Furthermore, it requires that they share equally in the expense of arbitration, regardless of the merits of their claim. Presumably, that expense could be substantial, since under the Commercial Arbitration Rules of the American Arbitration Association (1992), those expenses would, at a minimum, include: the arbitrator's fees and travel expenses, the cost of witnesses chosen by the arbitrator, the American Arbitration Association's administrative charges, and a filing fee of up to $4000, depending on the amount in controversy. For a proceeding involving multiple arbitrators, the administrative fee alone, for which the Casarottos would be responsible, is $150 a day. In addition, since the contract called for the application of Connecticut law, the Casarottos would be required to retain the services of a Connecticut attorney.

In spite of the expense set forth above, the procedural safeguards which have been established in Montana to assure the reliability of the outcome in dispute resolutions

are absent in an arbitration proceeding. The extent of pretrial discovery is within the sole discretion of the arbitrator and the rules of evidence are not applicable. The arbitrator does not have to follow any law, and there does not have to be a factual basis for the arbitrator's decision. *See May v. First National Pawn Brokers, Ltd.* (Mont. Dec. 15, 1994), Slip Op. 94-189.

Based upon the determination by the Legislature of this State that the citizens of this State are at least entitled to notice before entering into an agreement which will limit their future resolution of disputes to a procedure as potentially inconvenient, expensive, and devoid of procedural safeguards as the one provided for by the rules of the American Arbitration Association, and the terms of this contract, we conclude that the notice requirement of § 27-5-114, MCA, does establish a fundamental public policy in Montana, and that the application of Connecticut law would be contrary to that policy. Therefore, we conclude that the law of Montana governs the franchise agreement entered into between the Casarottos and Doctor's Associates, Inc.

ISSUE 2

If the contract is governed by Montana law, is the notice requirement in § 27-5-114(4), MCA, of Montana's Uniform Arbitration Act, preempted by the Federal Arbitration Act found at 9 U.S.C. §§ 1-15 (1988)?

DAI contends that even if Montana law is applicable, § 27-5-114(4), MCA, is preempted by the Federal Arbitration Act because it would void an otherwise enforceable arbitration agreement. In support of its argument, DAI relies on U.S. Supreme Court decisions in *Perry v. Thomas* (1987), 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426, *Southland Corp. v. Keating* (1984), 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1, and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*

(1983), 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765. These cases have been referred to as "[a] trilogy of United States Supreme Court cases" which "developed the federal policy favoring arbitration and the principle that the FAA is substantive law enacted pursuant to Congress's commerce powers that preempts contrary state provisions." David P. Pierce, *The Federal Arbitration Act: Conflicting Interpretations of its Scope* 61 Cinn. L. Rev. 623, 630 (1992). From this trilogy, *Southland* and *Perry* appear to be closest on point and warrant some discussion.

Southland Corporation was the owner and franchisor of 7-Eleven Convenience Stores. Its standard franchise agreements, like DAI's included an arbitration provision. Southland was sued in California by several of its franchisees, based on claims which included violations of the disclosure requirements of the California Franchise Investment Law, Cal. Corp. Code § 31000, *et seq.* (West 1977). The California Supreme Court held that the Franchise Investment Law required judicial consideraiton of claims brought under that statute, and therefore, held that arbitration could not be compelled. The U.S. Supreme Court disagreed, and held that:

> In creating a substantive rule applicable in state as well federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. We hold that § 31512 of the California Franchise Investment Law violates the Supremacy Clause.

Southland, 465 U.S. at 16 (footnotes omitted).

In *Perry,* the Supreme Court was called upon to reconcile 9 U.S.C. § 2 which mandates enforcement of arbitration agreements, with § 229 of the California Labor Code, "which provides that actions for the collection of wages may be maintained 'without regard to the existence of any private agreement to arbitrate.'" *Perry,* 465 U.S. at 484 (quoting Cal. Lab. Code § 229 (West 1971)).

In that case, Kenneth Thomas sued his former employer for commissions he claimed were due for the sale of securities. His employer sought to stay the proceedings pursuant to §§ 2 and 4 of the Federal Arbitration Act, based on the arbitration provision found in Thomas's application for employment. *Perry,* 465 U.S. at 484-85. In an opinion affirmed by the California Court of Appeals and the California Supreme Court, the California Superior Court denied the motion to compel arbitration. On appeal, the U.S. Supreme Court held that § 2 of the FAA reflected a strong national policy favoring arbitration agreements, notwithstanding "state substantive or procedural policies to the contrary." *Perry,* 482 U.S. at 489. Citing its decision in *Southland,* the Court held that:

> "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." Id. at 16 (footnote omitted). Section 2, therefore, embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law." *Keating, supra,* at 11.

Perry, 482 U.S. at 489-90.

As additional authority, DAI cites to our own previous decisions which have enforced arbitration agreements in Montana based on *Southland* and *Perry. See Downey v. Christensen* (1992), 251 Mont. 386, 825 P.2d 557; *Vukasin v. D.A. Davidson & Co.* (1990), 241 Mont. 126, 785 P.2d 713; *William Gibson, Jr., Inc. v. James Graff Communications* (1989), 239 Mont. 335, 780 P.2d 1131; *Larsen v. Opie* (1989), 237 Mont. 108, 771 P.2d 977; *Passage v. Prudential-Bache Securities, Inc.* (1986), 223 Mont. 60, 727 P.2d 1298.

The Casarottos, however, contend that *Southland* and *Perry* must be considered in light of the Supreme Court's more recent decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989), 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488, and that our prior arbitration decisions did not deal with the enforceability of arbitration agreements which violated Montana's statutory law. We agree.

In *Volt*, the parties entered into a construction contract which contained an agreement to arbitrate all disputes between the parties relating to the contract. The contract also provided that it would be governed by the law in the state where the project was located. *Volt*, 489 U.S. at 470.

As a result of a contract dispute between the parties, Stanford filed an action in California Superior Court naming Volt and two other companies involved in the construction project. Volt petitioned the Superior Court to compel arbitration of the dispute. However, the California Arbitration Act found at Cal. Civ. Proc. Code § 1280, *et seq.* (West 1982), contained a provision allowing the court to stay arbitration pending resolution of related litigation. On that basis, the Superior Court denied Volt's motion to compel arbitration, and instead, stayed arbitration proceedings pending outcome of the litigation. The California Court of Appeals affirmed that decision, and the California Supreme Court denied Volt's petition for discretionary review. The U.S. Supreme Court granted review and affirmed the decision of the California courts. *Volt*, 489 U.S. at 471-73.

On appeal, the Supreme Court considered Volt's argument that California's arbitration laws were preempted by the Federal Arbitration Act. In its analysis of the preemption issue, the Supreme Court stated that:

> The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. But even when

> Congress has not completely displaced state regulation in an area, state law may nonetheless be preempted to the extent that it actually conflicts with federal law—that is, to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *The question before us, therefore, is whether application of Cal.Civ.Proc. Code Ann. § 1281.2(c) to stay arbitration under this contract in interstate commerce, in accordance with the terms of the arbitration agreement itself, would undermine the goals and policies of the FAA. We conclude that it would not.*

Volt, 489 U.S. at 477-78 (citation omitted; emphasis added).

The Supreme Court explained that the purpose of the Federal Arbitration Act was to enforce lawful agreements entered into by the parties, and not to impose arbitration on the parties involuntarily. It noted that in this case the parties' agreement was to be bound by the arbitration rules from California. Therefore, it held that:

> Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to "rigorously enforce" such agreements according to their terms, see [*Dean Witter Reynolds, Inc. v.*]*Byrd*, [470 U.S.] at 221, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA.

Volt, 489 U.S. at 479.

While the Court in *Volt* applied state laws that had been chosen by the parties in their contract, and this case

involves state law which is applied pursuant to conflict of law principles, it has been observed that:

> The real significance of the *Volt* decision is not in the Court's holding, but rather in what the Court failed to hold. For example, the Court found no preemption of the California arbitration law by the FAA. Instead, the Court merely stated that Congress did not intend that the FAA occupy the entire field of arbitration law. Thus, enforcing the California law was merely a procedural issue and did not frustrate the policy behind the FAA of enforcing the agreement.

David P. Pierce, *The Federal Arbitration Act: Conflicting Interpretations of its Scope* 61 Cinn. L. Rev. 623, 635 (1992) (footnotes omitted).

Section 2 of 9 U.S.C. provides that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transactions, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

(Emphasis added.)

Based upon the Supreme Court's decision in *Volt,* we conclude that the nature of our inquiry is whether Montana's notice requirement found at § 27-5-114(4), MCA, would "undermine the goals and policies of the FAA." We conclude that it does not.

DAI relies on decisions in *Threlkeld & Co., Inc. v. Metallgesellschaft Ltd.* (2d Cir. 1991), 923 F.2d 245,

Securities Industry Ass'n v. Connolly (1st Cir. 1989), 883 F.2d 1114, *Webb v. R. Rowland & Co., Inc.* (8th Cir. 1986), 800 F.2d 803, and *Bunge Corp. v. Perryville Feed & Produce, Inc.* (Mo. 1985), 685 S.W.2d 837, in support of its argument that notice provisions are preempted by federal law.

The Casarottos, on the other hand, rely on decisions in *American Physicians v. Port Lavaca Clinic* (Tex. Ct. App. 1992), 843 S.W.2d 675, and *Albright v. Edward D. Jones & Co.* (Ind. Ct. App. 1991), 571 N.E.2d 1329, for the principle that since *Volt,* other courts have held that notice provisions in state arbitration laws are not preempted by the Federal Arbitration Act.

However, the cases cited by the parties either precede the Supreme Court's decision in *Volt,* or contain little or no reference to the *Volt* decision. We conclude that none are persuasive, and we must rely on our own analysis of whether Montana's notice requirement undermines the goals and policies of the FAA.

Our conclusion that Montana's notice requirement does not undermine the policies of the FAA is based on the Supreme Court's conclusion that it was never Congress's intent when it enacted the FAA to preempt the entire field of arbitration, and its further conclusion that the FAA does not require parties to arbitrate when they have not agreed to do so. That Court held that the purpose of the FAA is simply to enforce arbitration agreements into which parties had entered, and acknowledged that the interpretation of contracts is ordinarily a question of state law. *Volt,* 489 U.S. at 474.

Presumably, therefore, the Supreme Court would not find it a threat to the policies of the Federal Arbitration Act for a state to require that before arbitration agreements are enforceable, they be entered knowingly. To hold otherwise would be to infer that arbitration is so

onerous as a means of dispute resolution that it can only be foisted upon the uninformed. That would be inconsistent with the conclusion that the parties to the contract are free to decide how their disputes should be resolved.

Montana's notice requirement does not preclude parties from knowingly entering into arbitration agreements, nor do our courts decline to enforce arbitration agreements which are entered into knowingly.

Therefore, we conclude that Montana's notice statute found at § 27-5-114(4), MCA, would not undermine the goals and policies of the FAA, and is not preempted by 9 U.S.C. § 2 (1988).

Because the agreement of the parties in this case did not comply with Montana's statutory notice requirement, it is not subject to arbitration, according to the law of Montana. The District Court's order dated June 2, 1993, is, therefore, reversed, and this case is remanded to the District Court for further proceedings consistent with this opinion.

/s/ Terry Trieweiler
Justice

We concur:

/s/ John Conway Harrison

/s/ William E. Hunt, Sr.

/s/ James C. Nelson
Justices

Justice Terry N. Trieweiler specially concurring.

The majority opinion sets forth principles of law agreeable to the majority of this Court in language appropriate for judicial precedent. I offer this special concurring opinion as my personal observation regarding many of the federal decisions which have been cited to us as authority.

To those federal judges who consider forced arbitration as the panacea for their "heavy case loads" and who consider the reluctance of state courts to buy into the arbitration program as a sign of intellectual inadequacy, I would like to explain a few things.

In Montana, we are reasonably civilized and have a sophisticated system of justice which has evolved over time and which we continue to develop for the primary purpose of assuring fairness to those people who are subject to its authority.

Over the previous 100 years of our history as a state, our courts have developed rules of evidence for the purpose of assuring that disputes are resolved on the most reliable bases possible.

Based on the presumption that all men and women are fallible and make mistakes, we have developed standards for appellate review which protect litigants from human error or the potential arbitrariness of any one individual.

We believe in the rule of law so that people can plan their commercial and personal affairs. If our trial courts decline to follow those laws, our citizens are assured that this Court will enforce them.

We have rules for venue, and jurisdictional requirements based on the assumption that it is unfair to force people to travel long distances from their homes at great expense and inconvenience to prosecute or defend against lawsuits.

We believe that our courts should be accessible to all, regardless of their economic status, or their social importance, and therefore, provide courts at public expense and guarantee access to everyone.

We have developed liberal rules of discovery (patterned after the federal courts) based on the assumption that the open and candid exchange of information is the surest way to resolve claims on their merits and avoid unnecessary trials.

We have contract laws and tort laws. We have laws to protect our citizens from bad faith, fraud, unfair business practices, and oppression by the many large national corporations who control many aspects of their lives but with whom they have no bargaining power.

While our system of justice and our rules are imperfect, they have as their ultimate purpose one overriding principle. They are intended, and continue to evolve, for the purpose of providing fairness to people, regardless of their wealth or political influence.

What I would like the people in the federal judiciary, especially at the appellate level, to understand is that due to their misinterpretation of congressional intent when it enacted the Federal Arbitration Act, and due to their naive assumption that arbitration provisions and choice of law provisions are knowingly bargained for, all of these procedural safeguards and substantive laws are easily avoided by any party with enough leverage to stick a choice of law and an arbitration provision in its preprinted contract and require the party with inferior bargaining power to sign it.

The procedures we have established, and the laws we have enacted, are either inapplicable or unenforceable in the process we refer to as arbitration.

I am particularly offended by the attitude of federal judges, typified by the remarks of Judge Selya in the

First Circuit, which were articulated in *Securities Industry Ass'n v. Connolly* (1st Cir. 1989), 883 F.2d 1114, *cert. denied* (1990), 495 U.S. 956, 110 S. Ct. 2559, 109 L. Ed. 2d 742.

Judge Selya considered "[i]ncreased resort to the courts" as the cause for "tumefaction of already-swollen court calendars." He refers to arbitration as "a contractual device that relieves some of the organic pressure by operating as a shunt, allowing parties to resolve disputes outside of the legal system." *Connolly*, 883 F.2d at 1116. He states that "[t]he hope has long been that the Act could serve as a therapy for the ailment of the crowded docket." *Connolly*, 883 F.2d at 1116. He then bemoans that fact that, "[a]s might be expected, there is a rub: the patient, and others in interest, often resist the treatment." *Connolly*, 883 F.2d at 1116.

Judge Selya refers to the preference in the various state jurisdictions to resolve disputes according to traditional notions of fairness, and then suggests that "[t]he FAA was enacted to overcome this 'anachronism'." *Connolly*, 883 F.2d at 1119 (citation omitted). He considers it the role of federal courts to be "on guard for artifices in which the ancient suspicion of arbitration might reappear." *Connolly*, 883 F.2d at 1119.

This type of arrogance not only reflects an intellectual detachment from reality, but a self-serving disregard for the purposes for which courts exist.

With all due respect, Judge Selya's opinion illustrates an all too frequent preoccupation on the part of federal judges with their own case load and a total lack of consideration for the rights of individuals. Nowhere in Judge Selya's lengthy opinion is there any consideration for the total lack of procedural safeguards inherent in the arbitration process. Nowhere in his opinion does he consider the financial hardship that contracts, like the one in this

case, impose on people who simply cannot afford to enforce their rights by the process that has been forced upon them. Nowhere does Judge Selya acknowledge that the "patient" (presumably courts like this one) who resists the "treatment" (presumably the imposition of arbitration in lieu of justice) has a case load typically three times as great as Justice Selya's case load.

The notion by federal judges, like Judge Selya, that people like the Casarottos have knowingly and voluntarily bargained and agreed to resolve their contractual disputes or tort claims by arbitration, is naive at best, and self-serving and cynical at worst. To me, the idea of a contract or agreement suggests mutuality. There is no mutuality in a franchise agreement, a securities brokerage agreement, or in any other of the agreements which typically impose arbitration as the means for resolving disputes. National franchisors, like the defendant in this case, and brokerage firms, who have been the defendants in many other arbitration cases, present form contracts to franchisees and consumers in which choice of law provisions and arbitration provisions are not negotiable, and the consequences of which are not explained. The provision is either accepted, or the business or investment opportunity is denied. Yet these provisions, which are not only approved of, but encouraged by people like Judge Selya, do, in effect, subvert our system of justice as we have come to know it. If any foreign government tried to do the same, we would surely consider it a serious act of aggression.

Furthermore, if the Federal Arbitration Act is to be interpreted as broadly as some of the decisions from our federal courts would suggest, then it presents a serious issue regarding separation of powers. What these interpretations do, in effect, is permit a few major corporations to draft contracts regarding their relationships with others that immunizes them from accountability under the laws

of the states where they do business, and by the courts in those states. With a legislative act, the Congress, according to some federal decisions, has written state and federal courts out of business as far as these corporations are concerned. They are not subject to California's labor laws or franchise laws, they are not subject to our contract laws or tort laws. They are, in effect, above the law.

These insidious erosions of state authority and the judicial process threaten to undermine the rule of law as we know it.

Nothing in our jurisprudence appears more intellectually detached from reality and arrogant than the lament of federal judges who see this system of imposed arbitration as "therapy for their crowded dockets." These decisions have perverted the purpose of the FAA from one to accomplish judicial neutrality, to one of open hostility to any legislative effort to assure that unsophisticated parties to contracts of adhesion at least understand the rights they are giving up.

It seems to me that judges who have let their concern for their own crowded docket overcome their concern for the rights they are entrusted with should step aside and let someone else assume their burdens. The last I checked, there were plenty of capable people willing to do so.

/s/ Terry Trieweiler
Justice

Justice Fred J. Weber dissents as follows:

I respect the majority opinion in its expression of the deeply held conviction that arbitration of the type expressed in the contract in this case should not be enforced in Montana and thereby deprive the parties of access to the court system. The answer to such a judicial approach was stated by the United States Supreme Court in Volt Info. Sciences v. Bd. of Trustees (1989), 489 U.S. 468, 478, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488, 497, in which the United States Supreme Court stated:

> The Act [Federal Arbitration Act] was designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate," . . . and place such agreements "upon the same footing as other contracts," . . . Section 2 of the Act therefore declares that a written agreement to arbitrate in any contract involving interstate commerce or a maritime transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (Citations omitted.)

I specifically disagree with the majority opinion's refusal to enforce the agreement to arbitrate in the present case.

Issue I

As stated in the majority opinion: Based on conflict of law principles, is the franchise agreement entered into between the Casarottos and DAI governed by Connecticut law or Montana law?

I point out that the issue as stated by the parties essentially was whether an out-of-state corporation can avoid Montana Arbitration Act's conspicuous notice requirement by claiming preemption under the FAA?

The majority opinion refers to this Court's 1991 case of *Emerson v. Boyd*. In determining whether a contract dispute arose on an Indian reservation, that case adopted

language from *R.J. Williams Co.*, a Ninth Circuit case with regard to the factors to be used to determine whether an action did arise on the reservation. In contrast to the present case, *Emerson v. Boyd* did not contain an agreed choice of law as is present in this case. I do not find this to be appropriate authority.

The majority opinion on this issue concludes that the Montana Legislature had determined that its citizens are entitled to notice before entering into an agreement which will limit their future resolution of disputes to a procedure inconvenient, expensive and devoid of procedural safeguards—and further concludes that the notice requirements of § 27-5-114, MCA, established a fundamental public policy in this State which is contrary to the policy of the Connecticut law. On the basis of those conclusions, the majority opinion further concludes that the law of Montana governs. I do not agree with that conclusion.

The key parts of § 27-5-114, MCA, which apply to this issue are the following:

> Validity of arbitration agreement—exceptions. (1) A written agreement to submit an existing controversy to arbitration is valid and enforceable except upon such grounds as exist at law or in equity for the revocation of a contract.
>
> . . .
>
> (4) Notice that a contract is *subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page* of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration. (Emphasis supplied.)

Our question then becomes whether the contract here is subject to "arbitration pursuant to this chapter" so that the notice must be typed in underlined capital letters on the first page of the contract. Two specific paragraphs of the contract are controlling here. Section 10(c) of the contract stated in pertinent part:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut, . . .

Section 12 of the agreement further stated:

> 12. This Agreement shall be governed by and construed in accordance with the laws of the State of Connecticut and contains the entire understanding of the parties. Other than the representations contained in the Agreement, the Offering Circular and advertising materials of the Franchisor, no other representations have been made to or relied upon by the Franchisee except as set forth below: (None are set forth)

When the foregoing contract provisions are compared to subsection (4) of § 27-5-114, MCA, it is apparent that these contract provisions do not fit within the statute. There is no statement in the Franchise Agreement which specifies that the contract is subject to arbitration pursuant to Montana law or to the Uniform Arbitration Act as enacted in Montana under §§ 27-5-111 to 115, MCA.

I conclude that the contract provisions are controlling in this instance and that the contract between the parties is not by its terms subject to Montana law or arbitration under Monana law. In fact the reverse is true. As above specified, the agreement requires that the commercial rules of the American Arbitration Association shall be applied in any arbitration, and also provides that the agreement is governed by and construed under the laws of the State of Connecticut. This clearly rebuts any suggestion that this particular contract is subject to arbitration pursuant to the laws of the Sate of Montana and in particular § 27-5-114, MCA. I therefore conclude that the notice requirement of § 27-5-114, MCA, does not in

any way establish a fundamental public policy which is applicable to the present contract.

I further point out that the reference to Restatement (Second) of Conflict of Laws, § 188 (1971), is applicable only in the absence of an "effective" choice of law and I conclude there was such an effective choice of law in the present case.

Issue II

If the contract is governed by Montana law, is the notice requirement of § 27-5-114(4), MCA, of Montana's Uniform Arbitration Act, preempted by the Federal Arbitration Act found at 9 U.S.C. § 1-15 (1988)?

The majority opinion quotes the following from the 1987 United States Supreme Court opinion of *Perry v. Thomas*:

> . . . Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. . . . Section 2, therefore, embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce . . . *We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law*. . . . (Emphasis supplied.)

The affidavit of the vice president of DAI establishes without contradiction that the present agreement to arbitrate is part of a contract in interstate commerce:

> 5. Before July 1991, DAI was a corporation organized under the laws of the State of Connecticut, with a principal place of business at 325 Bic Drive, Milford, CT 06460. On July 1, 1991, DAI of Florida merged with DAI of Connecticut, leaving DAI of Florida as a surviving corporation.
>
> 6. DAI has sold a total of 8500 Subway franchises in the United States and estimates that there

are approximately 7400 stores in operation world wide.

Clearly the present agreement to arbitrate is part of a contract evidencing interstate commerce so the Federal Arbitration Act is applicable.

The majority opinion analyzes the United States Supreme Court's decision in *Volt* and from that concludes that the nature of the inquiry is whether Montana's notice requirement under § 27-5-114(4), MCA, would undermine the goals and policy of the FAA and further concludes it does not. I disagree with that analysis of *Volt*.

In *Volt*, Volt petitioned the California court to compel arbitration of a dispute and the defendant moved to stay arbitration pursuant to California law. The California statute permitted the court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it. The California court stayed the arbitration proceedings pending the outcome of the litigation. In considering whether the California code section in question was preempted by the FAA, the United States Supreme Court stated:

> The FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. . . . But even when congress has not completely displaced state regulation in an area, state law may nonetheless be preempted to the extent that it actually conflicts with federal law—that is, to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." . . . The question before us, therefore, is whether application of Cal. Civ. Proc. Cod. Ann. § 1281.2(c) to stay arbitration under this contract in interstate commerce, in accordance with the terms of the arbitration agreement itself, would undermine the goals and policies of the FAA. We conclude it would not.
>
> . . .
>
> . . . Accordingly, we have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so. See id., at 219, 84 L.Ed.2d 158, 105 S.Ct. 1238. (The Act "does not mandate the arbitration of all claims"), nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. *It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. . . .* (Citations omitted.) (Emphasis supplied.)

Volt, 489 U.S. at 477-78, 109 S.Ct. at 1255, 103 L.Ed. 2d at 499-500. The court further stated and concluded:

> Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit . . . Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.

Volt, 489 U.S. at 479, 109 S.Ct. at 1256, 103 L.Ed. at 500. It is essential to keep in mind that the key holding of *Volt* as expressed by the United States Supreme Court was that the agreement to arbitrate should be enforced according to its terms—and that allowed application of the California law which provided for the stay in proceedings where other parties besides the arbitration parties were involved in the case. That conclusion does not assist the majority opinion. The rationale of the *Volt* de-

cision in the present case would require enforcement of the contract as agreed upon by the parties—which would require application of the American Arbitration Association rules as well as the laws of the State of Connecticut. I conclude that the contract here should be enforced to require application of the American Arbitration Association Rules and the laws of the State of Connecticut under *Volt*.

In addition to the conclusion reached under *Volt*, I will discuss several cases which have concluded that a statutory provision similar to Montana's statutory requirement of a statement in capital letters on page one of a contract is in conflict with the Federal Arbitration Act and therefore not enforceable. In David L. Threlkeld and Co. v. Metallgesellschaft Ltd. (2nd Cir. 1991), 923 F.2d 245, Threlkeld asserted that Vermont law voided any arbitration agreement which does not have a specific acknowledgement of arbitration signed by both parties and where the agreement to arbitrate has not been displayed prominently in the contract. The circuit court acknowledged that Threlkeld was correct in asserting that the contracts did not comply with the rigorous Vermont standard. The circuit court then concluded that the Vermont statute is preempted by federal law and stated:

> Because federal arbitration law governs this dispute, we must determine whether the Vermont statute is sufficiently consistent with federal law that the two may peacefully coexist. . . . The First Circuit has recently held that restrictive provisions similar to those found in the Vermont statute are preempted by federal law. . . .
>
> We agree with the First Circuit that state statutes such as the Vermont statute directly clash with the Convention and with the Arbitration Act because they effectively reincarnate the former judicial hostility towards arbitration. Accordingly *we hold that the Convention and the Arbitration Act preempt the Vermont statute, and that the . . . arbitration provisions, as drafted, are not enforceable.* Emphasis supplied.)

Threlkeld, 923 F.2d at 250. *Threlkeld* is clear authority for concluding that the Montana statute directly clashes with the Federal Arbitration Act and therefore is not enforceable.

In a similar manner, Bunge Corp. v. Perryville Feed and Produce (Mo.1985), 685 S.W.2d 837, addresses a similar issue. As pointed out by the Missouri court in *Bunge*, the Missouri statute is based on the Uniform Arbitration Act (as is the Montana statute) and contains a provision that each contract shall include a statement in 10 point capital letters which reads substantially as follows: THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES. The Missouri Supreme Court then stated:

> It is clear that § 435.460, if applied to this case, seeks to impose a requirement for contracts to arbitrate which is in addition to the requirements of the Federal Arbitration Act. All that is apparently required under that act is contractual language and format sufficient for an ordinarily written contract. . . . *If the Missouri statute applies, then a commercial contract sufficient under federal law would be in violation.*
>
> There is a manifest violation of the supremacy clause if our statute is so applied. The Federal Arbitration Act was passed by Congress pursuant to its power to regulate interstate commerce . . . Any requirement of state law which adds a burden not imposed by Congress is in derogation of the Congressional power, and pro tanto invalid. A very recent case so holding is *Southland Corp. v. Keeting*. . .
>
> We do not hold that the Missouri statute is unconstitutional. We simply hold that it may not be

applied to defeat the arbitration provision of a contract which is within the coverage of the federal statute. . . . (Citations omitted.) (Emphasis supplied.)

Bunge, 685 S.W.2d at 839. The *Bunge* conclusion is directly applicable to our present case. If our Montana statute applies to the present case, then a commercial contract sufficient under federal law would be in violation of the Montana statute even though it meets the requirement of the Federal Arbitration Act. As a result, even if we accept the majority opinion conclusion that the Montana code section applies, I would hold that Montana law may not be applied to defeat the arbitration principles of a contract which is clearly within the coverage of the Federal Arbitration Act.

The District Court held that the Federal Arbitration Act required that the present suit should be stayed until the arbitration has been held in accordance with the terms of the agreement. I would affirm that holding.

/s/ Fred J. Weber
Justice

Chief Justice J. A. Turnage concurs in the foregoing dissent.

/s/ J. A. Turnage
Chief Justice

Justice Karla M. Gray, dissenting.

I respectfully dissent from the Court's opinion on both issues presented therein. I write separately because the reasons for my dissent are not altogether identical to those which form the basis for Justice Weber's dissent.

With regard to issue one, I conclude that the franchise agreement entered into between the Casarottos and DAI was governed by Connecticut law. It is my view that the Court's analysis of this issue is incomplete and erroneous.

I agree with the Court's synopsis of our decision in *Emerson v. Boyd* and, on the basis that the agreement before us does include a choice of law provision, on the inapplicability of that decision to the case before us. In my view, *Youngblood* also is not on point here, since that case did not relate to whether a statute represents a statement of public policy by the Montana legislature and, if so, the extent of that statement of public policy.

I agree with the Court that Montana has a materially greater interest than Connecticut in the contract issue presented and that, absent an "effective" choice of law by the parties, Montana law would apply. I disagree with the remainder of the Court's discussion and analysis on this issue.

My primary concern is that the Court neither presents nor discusses the specific language contained in the statutory notice requirement. That statute provides that "[n]otice *that a contract is subject to arbitration pursuant to this chapter* shall be typed in underlined capital letters on the first page of the contract; . . . ." Section 27-5-114(4), MCA. By its terms, the franchise agreement before us is subject to Connecticut law, not "this chapter"—the MUAA. The legislature's specific limitation on the applicability of the notice requirement is clear and unambiguous; under such a circumstance, we are obligated to so interpret it (Curtis v. Dist. Court of

21st Jud. Dist. (Mont. 1994), 879 P.2d 1164, 1166, 51 St.Rep. 776, 778) and conclude that the notice requirement is *not* applicable to the contract before us. Since the statute is inapplicable by its terms to the contract, it cannot form the basis of a public policy broad enough to negate the parties' choice of Connecticut law.

The Court does not even address the specific statutory language, preferring to resort inappropriately to generalized legislative history for its overly broad interpretation of the extent to which the notice requirement applies and the extent to which the legislature adopted the notice rquirement as a public policy. Had the legislature intended the notice requirement to apply to every arbitration agreement entered into by a citizen or resident of Montana, notwithstanding that some other jurisdiction's law would otherwise apply, it would have done so; it did not. It is inappropriate for the Court to judicially broaden the legislature's clear statute in the guise of a conflict of law analysis.

With regard to issue two, I conclude that even if the Court were correct regarding the applicability of Montana's notice requirement under conflict of law principles, that requirement is preempted by the Federal Arbitration Act (FAA). Therefore, I also dissent from the Court's opinion on this issue.

The Court suggests that the United States Supreme Court's *Volt* decision was a departure from its earlier *Southland/Perry* line of cases. It then presents an inadequate analysis of *Volt*. Finally, the Court concludes, purportedly under a *Volt* analysis, that Montana's notice requirement does not undermine the goals and policies of the FAA. Nothing could be further from the truth.

In *Southland*, the United States Supreme Court was faced with a California statute which required judicial consideration of certain claims brought under it; the California courts held that the statute precluded arbitration

under an agreement containing an arbitration provision. Determining that the FAA was a substantive rule applicable in state courts by which Congress intended "to foreclose state legislative attempts to undercut the enforceability of arbitration agreements," the Supreme Court held that the California statute violated the supremacy clause. *Southland* was decided in 1984.

In 1987, the Supreme Court decided *Perry*, another California case involving a different California statute which—by its terms—provided that legal actions for the collection of wages could be maintained notwithstanding an agreement to arbitrate such claims. Again the California courts denied a motion to compel arbitration under the parties' agreement, favoring their legislature's effort to render arbitration agreements unenforceable. And again the United States Supreme Court reversed, quoting its *Southland* language that Congress intended to foreclose state legislatures from undercutting the enforceability of arbitration agreements. For additional clarity, the Supreme Court added " 'We see nothing in the [FAA] indicating that the broad principle of enforceability is subject to any additional limitations under state law.' " *Perry*, 482 U.S. at 489-90 (citations omitted). *Southland* and *Perry* are, as the Court notes, consistent with each other.

In 1989, the Supreme Court decided *Volt*. There, faced with yet another California statute and another decision from the California courts denying a motion to compel arbitration on the basis of the state statute, the Supreme Court affirmed. Contrary to this Court's suggestion, *Volt* is entirely consistent with—and not a retrenchment from—*Southland* and *Perry*. All three cases require this Court to conclude that Montana's notice requirement is preempted by the FAA.

In *Volt*, the parties had specifically agreed to submit disputes under their contract to arbitration under the California arbitration statutes. The California arbitration

statute at issue in *Volt* differed markedly from those in *Southland* and *Perry*. As noted above, the earlier cases involved statutes which clearly undercut the enforceability of arbitration agreements. In *Volt*, however, the statute—part of the California Arbitration Act—merely allowed a court to *stay* arbitration pending resolution of related litigation; the right to arbitrate remained. The issue before the Supreme Court was the same as in the earlier cases: whether the stay provision would undermine the goals and policies of the FAA.

The Supreme Court reiterated that the purpose of the FAA was to *enforce* arbitration agreements entered into by parties, and specifically noted the parties' agreement to apply California's arbitration rules, one of which permitted the stay of arbitration pending related litigation. On these facts, including the parties' choice of California arbitration law and that that law permitted a stay—but not a voiding—of arbitration, the Supreme Court held that enforcing the California stay provision did not frustrate the policy behind the FAA of enforcing arbitration agreements.

The Court's opinion fails—or refuses—to recognize two important differences between *Volt* and the case presently before us. First, the Supreme Court in *Volt* relied heavily on the fact that the parties had affirmatively chosen California arbitration law, including the stay statute, to govern their agreement. Second, the stay statute did not undercut, undermine or render unenforceable the parties' agreement to arbitrate.

Here, the parties did not affirmatively choose Montana arbitration law, which includes the notice requirement, to govern their agreement. They chose Connecticut law.

Moreover, it is clear under *Southland*, *Perry* and *Volt* that Montana's notice requirement is preempted by the Federal Arbitration Act. The reason for this constitutes the second important difference between this case and

Volt: here, the application of the notice requirement is not merely a procedural matter; indeed, it totally undermines the purposes of the FAA by rendering the parties' arbitration agreement unenforceable. This is precisely the result prohibited by the United States Supreme Court in all three of the cases discussed herein and in the Court's opinion on this issue.

I would affirm the District Court's grant of defendants' motion to stay judicial proceedings pending arbitration of plaintiffs' claims.

/s/ Karla M. Gray
Justice

Chief Justice J.A. Turnage joins in the foregoing dissent of Justice Karla M. Gray.

/s/ J.A. Turnage
Chief Justice

[Filed Aug. 31, 1995]

IN THE SUPREME COURT
OF THE STATE OF MONTANA
1995

No. 93-488

PAUL CASAROTTO and PAMELA CASAROTTO,
Plaintiffs and Appellants,

v.

NICK LOMBARDI and DOCTOR'S ASSOCIATES, INC.,
Defendants and Respondents,

and

DANIEL L. and DEB HUDSON,
and D&D SUBWAY CORPORATION,
Defendants.

Appeal from District Court of the Eighth Judicial District,
In and for the County of Cascade,
The Honorable John M. McCarvel, Judge presiding

Submitted: August 22, 1995

Decided: August 31, 1995

Justice Terry N. Trieweiler delivered the opinion of the Court.

Plaintiffs Paul and Pamela Casarotto filed this suit in the District Court for the Eighth Judicial District in Cascade

County to recover damages which they claim were caused by the defendants' breach of contract and tortious conduct. Defendants Nick Lombardi and Doctor's Associates, Inc. (DAI) moved the District Court for an order dismissing plaintiffs' complaint, or in the alternative, staying further judicial proceedings pending arbitration of plaintiffs' claims pursuant to a provision in DAI's franchise agreement with plaintiffs which required that disputes "arising out of or relating to" that contract be settled by arbitration. The District Court granted defendants' motion, and ordered that further judicial proceedings be stayed until arbitration proceedings were completed in accordance with the terms of the parties' agreement. Plaintiffs appealed from that order, and on December 15, 1994, we reversed the order of the District Court and remanded this case to that court for further proceedings. *Casarotto v. Lombardi* (1994), 268 Mont. 369, 886 P.2d 931. Following this Court's decision, the defendants petitioned the Supreme Court of the United States for a writ of certiorari. That petition was granted, and on June 12, 1995, the United States Supreme Court ordered that the December 15, 1994, judgment of this Court be vacated, and remanded this case to the Supreme Court of Montana for further consideration in light of that Court's decision in *Allied-Bruce Terminix Cos. v. Dobson* (1995), 513 U.S. ——, 115 S. Ct. 834, 130 L. Ed. 2d 753. Having further considered our prior decision in light of *Dobson*, we now reaffirm and reinstate our prior opinion.

FACTUAL BACKGROUND

Paul and Pamela Casarotto entered into a franchise agreement with DAI which allowed them to open a Subway Sandwich Shop in Great Falls, Montana. DAI's franchise agreement included on page nine a provision which required that controversies or claims related to the contract shall be settled by arbitration in Bridgeport, Connecticut. However, the franchise agreement did not include

notice on the front page to the effect that the contract was subject to arbitration, as required by § 27-5-114(4), MCA.

The Casarottos filed this action in the District Court based on their allegations that DAI breached its agreement with them, defrauded them, and engaged in other tortious conduct, all of which resulted in loss of business and the resulting damage.

DAI moved to dismiss the Casarottos' claim or to stay further judicial proceedings pending arbitration pursuant to the arbitration provision in its franchise agreement. The District Court granted DAI's motion to stay further judicial proceedings pursuant to 9 U.S.C. § 3, which is part of the Federal Arbitration Act found at 9 U.S.C. §§ 1-15 (1988).

On appeal from the District Court's order, we considered whether Montana's notice requirement was preempted by the Federal Arbitration Act in light of the U.S. Supreme Court's recent decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989), 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488. In that case, the Supreme Court stated that:

> The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be preempted to the extent that it actually conflicts with federal law—that is, to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed.2d 581 (1941). *The question before us, therefore, is whether application of Cal.Civ.Proc. Code Ann. § 1281.2(c) to stay arbitration under this*

> *contract in interstate commerce, in accordance with the terms of the arbitration agreement itself, would undermine the goals and policies of the FAA. We conclude that it would not.*

Volt, 489 U.S. at 477-78, 109 S. Ct. at 1255 (citation omitted; emphasis added).

Based on the cited language from *Volt*, we concluded that the nature of our inquiry was whether Montana's notice requirement found at § 27-5-114(4), MCA, would "undermine the goals and policies of the FAA." We concluded that it does not. *Casarotto*, 886 P.2d at 931. We explained our conclusion as follows:

> Our conclusion that Montana's notice requirement does not undermine the policies of the FAA is based on the Supreme Court's conclusion that it was never Congress's intent when it enacted the FAA to preempt the entire field of arbitration, and its further conclusion that the FAA does not require parties to arbitrate when they have not agreed to do so. That Court held that the purpose of the FAA is simply to enforce arbitration agreements into which parties had entered, and acknowledged that the interpretation of contracts is ordinarily a question of state law. *Volt*, 489 U.S. at 474, 109 S.Ct. at 1253.
>
> Presumably, therefore, the Supreme Court would not find it a threat to the policies of the Federal Arbitration Act for a state to require that before arbitration agreements are enforceable, they be entered knowingly. To hold otherwise would be to infer that arbitration is so onerous as a means of dispute resolution that it can only be foisted upon the uninformed. That would be inconsistent with the conclusion that the parties to the contract are free to decide how their disputes should be resolved.
>
> Montana's notice requirement does not preclude parties from knowingly entering into arbitration

> agreements, nor do our courts decline to enforce arbitration agreements which are entered into knowingly.
>
> Therefore, we conclude that Montana's notice statute found at § 27-5-114(4), MCA, would not undermine the goals and policies of the FAA, and is not preempted by 9 U.S.C. § 2 (1988).

Casarotto, 886 P.2d at 938-39.

On January 18, 1995, subsequent to our decision in this case, the U.S. Supreme Court decided *Dobson*. On June 12, 1995, the same Court vacated our prior *Casarotto* decision and remanded the matter to this Court for further consideration in light of the *Dobson* decision.

In *Dobson*, the plaintiffs were the assignees of a contract with Terminix for life-time protection against termites. They sued Terminix in Alabama state court when they found their house "swarming with termites." Terminix moved the court for a stay pursuant to § 2 of the Federal Arbitration Act (9 U.S.C. § 2 (1988)) so that arbitration could proceed pursuant to a provision for arbitration in the termite protection plan. The stay was denied. The Supreme Court of Alabama upheld the denial on the basis of Ala. Code § 8-1-41(3) (1993), which made written, predispute arbitration agreements invalid and unenforceable. The Alabama court concluded that its state statute was not preempted by the Federal Arbitration Act because the connection between the termite contract and interstate commerce was too slight.

> In the court's view, the Act applies to a contract only if " 'at the time [the parties entered into the contract] and accepted the arbitration clause, they *contemplated* substantial interstate activity.' " Despite some interstate activities (*e.g.*, Allied-Bruce, like Terminix, is a multistate firm and shipped treatment and repair material from out of state), the court found that the parties "contemplated" a transaction that was primarily local and not "substantially" interstate.

Dobson, 115 S. Ct. at 837 (citations omitted).

Before addressing the issue presented, the *Dobson* majority reiterated its conclusion that the purpose of the Federal Arbitration Act was to "overcome judicial hostility to arbitration agreements and that applies in both federal and state courts." *Dobson*, 115 S. Ct. at 835. The Court then went on to conclude that the language in § 2 of the Act which applied its provisions to any "contract evidencing a transaction involving commerce" had broader significance than the words of art "in commerce," and therefore, covered more than persons or activities "within the flow" of interstate commerce. *Dobson*, 115 S. Ct. at 839. The Court held that the word "involving," like "affecting," signaled an intent on the part of Congress "to exercise Congress's commerce power to the full," *Dobson*, 115 S.Ct. at 841, and secondly that the Act's preemptive force applies to transactions which, in fact, involve interstate commerce, even though a connection to interstate commerce may not have been contemplated by the parties at the time they entered into the agreement. For these reasons, the judgment of the Supreme Court of Alabama was reversed. *Dobson*, 115 S. Ct. at 843.

After careful review, we can find nothing in the *Dobson* decision which relates to the issues presented to this Court in this case. Our prior *Casarotto* decision did not involve state law which made arbitration agreements invalid and unenforceable. Our state law simply requires that the parties be adequately informed of what they are doing before they enter into an arbitration agreement. Our decision did not involve an analysis of what was meant by "involving commerce" or "affecting commerce" or "in commerce." We assumed, in the *Casarotto* decision, that the transaction with which we were concerned involved

interstate commerce, and that any state law which frustrated the purposes of the Federal Arbitration Act would be preempted.

Finally, there is no suggestion in the *Dobson* decision that the principles from *Volt* on which we relied have been modified in any way. To our knowledge, it is still the law, therefore, that state law is only preempted to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Volt*, 489 U.S. at 477, 109 S. Ct. at 1255 (citing *Hines v. Davidowitz* (1941), 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 2d 581).

While the *Dobson* decision does include a discussion extolling the virtues of arbitration as a "less expensive alternative to litigation," *Dobson*, 115 S. Ct. at 843 (apparently based on input from the American Arbitration Association), and while that conclusion is at odds with facts set forth in Justice Trieweiler's concurring opinion to our earlier decision, the concurring opinion was not the basis for our decision.

For these reasons, we conclude, after thorough review of our earlier decision in light of the U.S. Supreme Court's decision in *Dobson*, that the decisions are not inconsistent, and therefore, that there is no basis for modifying or reversing our earlier opinion. We reaffirm and reinstate our opinion dated December 15, 1994, in the above matter, and remand this case to the District Court for further proceedings consistent with this opinion.

/s/ Terry N. Trieweiler
Justice

We concur:

/s/ James C. Nelson
/s/ William E. Hunt, Sr.
/s/ W. William Leaphart
Justices

Justice W. William Leaphart, specially concurring.

Justice John C. Harrison was in the majority in this Court's initial decision in Casarotto v. Lombardi (1994), 268 Mont. 369, 886 P.2d 931. Justice Harrison has since retired. As the successor to Justice Harrison, it is incumbent on me to review that decision in light of the remand from the United States Supreme Court. Having reviewed the *Casarotto* decision, I specially concur with the Court's conclusion that Montana's notice requirement in § 27-5-114(4), MCA, does not undermine the goals and policies of the FAA and is not preempted by 9 U.S.C. § 2 (1988). I have also reviewed the United States Supreme Court's decision in Allied-Bruce Terminix Cos. v. Dobson (1995), 115 S.Ct. 834, 130 L.Ed.2d 753, and I see no reason why the principles enunciated in that decision should have any effect upon this Court's decision in *Casarotto*.

In *Dobson*, the United States Supreme Court held that the FAA preempts anti-arbitration state statutes which invalidate arbitration agreements. Section 27-5-114(4), MCA, cannot be characterized as anti-arbitration nor does it invalidate arbitration agreements. On the contrary it is one section of Montana's Uniform Arbitration Act which specifically recognizes arbitration agreements: "A written agreement to submit an existing controversy to arbitration is valid and enforceable except upon such grounds as exist at law or in equity for the revocation of a contract." Section 27-5-114(1), MCA. The notice requirement of subsection (4) merely protects the consumer by requiring that notice of an arbitration provision be conspicuously placed on the front page of the contract. This does not undermine the pro-arbitration policy of the FAA. Rather, it furthers the policy of meaningful and consensual arbitration by helping ensure that the consumer who signs what is most often a nonnegotiated, form contract, knowingly agrees to arbitration in the event of a dispute. I see no inconsistency between *Dobson* and our decision in *Casa-*

rotto and I specially concur in the Court's decision to reaffirm and reinstate its December 15, 1994 opinion.

/s/ W. William Leaphart
Justice

Justice Karla M. Gray, dissenting.

I dissent from the Court's opinion and order and its reinstatement of its prior opinion in this case. My dissent is based on the procedures used by the Court in addressing the United States Supreme Court's vacating of our earlier opinion and remanding for our reconsideration based on its decision in Allied-Bruce Terminix Cos. v. Dobson (1995), 115 S.Ct. 834, 130 L.Ed.2d 753. I also dissent from the Court's conclusion that nothing in the *Dobson* case relates to the issues presented to this Court. In dissenting, I also reaffirm and reinstate my earlier dissent in this case.

A remand for reconsideration to this Court from the United States Supreme Court is an uncommon occurrence for which we have no procedural rules or practices in place. Counsel for the parties were left without guidance as to how they should proceed in order to be heard during this phase of the case. Counsel for the defendants/respondents requested the opportunity to brief the issues raised by the United States Supreme Court's remand and to present oral argument. Without so much as a mention of this request, the Court apparently denies it. While one can only speculate on the reasons for such an implicit decision, one must assume that the Court is simply unwilling to consider any analysis that would require a change in the result it remains determined to reach. I cannot join in such an arrogant and cavalier approach to this important case on remand from the United States Supreme Court.

More importantly, I disagree with the Court's conclusion that nothing in *Dobson* relates to the issues before us. While I agree that the substantive issue addressed at length in *Dobson* is not before us here, I read more importance into the early language in *Dobson* than does the Court. In *Dobson*, the United States Supreme Court reiterates the fundamental premise of the Federal Arbitration Act by citing to *Volt*, the very case which this Court

erroneously interprets and on which it premises its erroneous decision, for the proposition that "the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Dobson*, 115 S.Ct. at 838; citing Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ. (1989), 489 U.S. 468, 474. The Supreme Court goes on to say that "[n]othing significant has changed in the 10 years subsequent to *Southland*; no later cases have eroded *Southland's* authority[.]" *Dobson*, 115 S.Ct. at 839. It is this latter statement on which I believe we must focus in reconsidering our decision here. The Court refuses to do so.

I continue to believe that this Court erroneously interprets *Volt*, which was decided by the Supreme Court five years after *Southland*. *Volt* is clearly distinguishable on its facts from the case before this Court and cannot properly serve as a basis for the result the Court reaches. *Volt* is neither inconsistent with, nor a retrenchment from, *Southland*, as this Court suggested in its earlier opinion and suggests again today. This is the message I take from the Supreme Court's statement in *Dobson* that "no later cases have eroded *Southland*'s authority;" this is the portion of this Court's earlier opinion to which I believe the Supreme Court was directing our attention on remand.

For the reasons stated in my earlier dissent, it is my view that application of Montana's notice statute is preempted by the Federal Arbitration Act in this case because application of that statute undercuts, undermines and renders unenforceable the parties' agreement to arbitrate. This view is entirely consistent both with *Southland* and with a proper interpretation of *Volt*. Therefore, I dissent from the Court's opinion and order and reinstate my prior dissent in this case.

/s/ Karla M. Gray
Justice

Chief Justice J.A. Turnage and Justice Fred J. Weber join in the foregoing dissent of Justice Karla M. Gray.

/s/ J.A. Turnage
Chief Justice

/s/ Fred J. Weber
Justice

[Filed Sept. 19, 1995]

IN THE SUPREME COURT OF THE
STATE OF MONTANA

D.C. Case No. BDV 92-860

S.C. Case No. 93-488

June Term A.D. 1995

REMITTITUR

The Chief Justice of the Supreme Court of the State of Montana:

To the Honorable Judge of the District Court of the Eighth Judicial District, in and for the County of Cascade, Greetings:

WHEREAS, In the said District Court in a cause between PAUL CASAROTTO and PAMELA CASAROTTO, Plaintiffs and Appellants, and NICK LOMBARDI and DOCTOR'S ASSOCIATION, INC., Defendants and Respondents, and DANIEL L. and DEB HUDSON, and D&D SUBWAY CORPORATION, Defendants, wherein the judgment of the District Court entered in said cause on the 2nd day of June, A.D. 1993 was in favor of Defendants and Respondents and against Plaintiffs and Appellants which was brought into The Montana Supreme Court by virtue of an appeal,

AND WHEREAS, in the June term of the Court in the year of our Lord, One Thousand Nine-Hundred and Ninety-Five the cause came before The Montana Supreme Court on remand by the United States Supreme Court.

WHEREUPON, On remand and reconsideration, it is now here ordered and adjudged that this Court's Opinion issued December 15, 1994 is reaffirmed and reinstated.

WITNESS: The Honorable J.A. Turnage, Chief Justice of the Supreme Court of the State of Montana, this 19th day of September, A.D. 1995.

/s/ Ed Smith
Clerk of the Supreme Court
of the State of Montana

[SEAL]

[Filed in Montana Eighth Judicial District Court]

FRANCHISE OFFERING CIRCULAR FOR PROSPECTIVE FRANCHISEES AS REQUIRED BY THE FEDERAL TRADE COMMISSION 1988

DOCTOR'S ASSOCIATES, INC.

DATE OF ISSUANCE OF DISCLOSURE STATEMENT ————————

INFORMATION FOR PROSPECTIVE FRANCHISEES REQUIRED BY THE FEDERAL TRADE COMMISSION

———————

TO PROTECT YOU, WE'VE REQUIRED YOUR FRANCHISOR TO GIVE YOU THIS INFORMATION. *WE HAVEN'T CHECKED IT, AND DON'T KNOW IF IT'S CORRECT.* WHILE IT INCLUDES SOME INFORMATION ABOUT YOUR CONTRACT, DON'T RELY ON IT ALONE TO UNDERSTAND YOUR CONTRACT. READ ALL OF YOUR CONTRACT CAREFULLY. BUYING FRANCHISE IS A COMPLICATED INVESTMENT. TAKE YOUR TIME TO DECIDE. IF POSSIBLE, SHOW YOUR CONTRACT AND THIS INFORMATION TO AN ADVISOR, SUCH AS A LAWYER OR AN ACCOUNTANT. IF YOU FIND ANYTHING YOU THINK MAY BE WRONG OR ANYTHING IMPORTANT THAT'S BEEN LEFT OUT, YOU SHOULD LET US KNOW ABOUT IT. IT MAY BE AGAINST THE LAW.

THERE MAY ALSO BE LAWS ON FRANCHISING IN YOU STATE. ASK YOUR STATE AGENCIES ABOUT THEM.

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

* * * *

FRANCHISE BROKERS (DEVELOPMENT AGENTS)

In certain areas of the country, the franchisor operates through Development Agents whose duties include franchise sales, site location assistance, training, and operational assistance to franchisees. Development Agents are generally franchisees of the franchisor and are typically selected from existing franchise owners. For their services rendered to the Company, Development Agents are paid a portion of the initial franchise fee and a portion of royalties collected.

Development Agents are prohibited from making any representations of sales or profits to prospective purchasers of franchises. Additionally, Development Agents are obligated to abide by all federal and state laws in the performance of their duties. Development Agents are independent contractors and not employees of the franchisor. The franchisor disclaims responsibility for any acts or statements made by Development Agents contrary to the disclosures made in the Offering Circular, the Franchise Agreement, the Operations Manual and Rules and related contracts.

As of the effective date of this Offering Circular, the Development Agents of the franchisor were as follows:

* * * *

The Franchise Agreement provides for binding arbitration of any claim or breach of the Agreement in accordance with the Commercial Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut. The cost of this proceeding is to be borne equally by the parties.

* * * *

[Filed in Montana Eighth Judicial District Court]

Franchise	4614
Owner Number	2730
Date Executed	4/25/88

FRANCHISE AGREEMENT

DOCTOR'S ASSOCIATES, INC.

with

PAUL S. CASAROTTO

FRANCHISE AGREEMENT

Agreement, this 25th day of April, 1988, between DOCTOR'S ASSOCIATES, INC., a Connecticut corporation located at Milford, Connecticut (hereinafter called the Company) and Paul S. Casarotto of Montana (hereinafter called the Franchisee, for one SUBWAY Sandwich Shop to be located in the State of Montana.

A. The Company is the owner of proprietary and other rights and interests in various service marks, trademarks and trade names used in its business including the trade name and service mark "SUBWAY".

B. The Company operates, and enfranchises others to operate, sandwich shops under the trade name and service mark SUBWAY using certain recipes, formulas, food preparation procedures, business methods, business forms and business policies it has developed. The Company has also developed a body of knowledge pertaining to the establishment and operation of sandwich shops. The Franchisee acknowledges that he does not presently know these recipes, formulas, food preparation procedures, business methods or business policies, nor does the Franchisee have these business forms or access to the Company's body of knowledge.

C. The Franchisee intends to enter the sandwich business and desires access to the Company's recipes, formulas, food preparation procedures, business methods, business forms, business policies and body of knowledge pertaining to the operation of a sandwich shop. In addition, the Franchisee desires access to information pertaining to new developments and techniques in the Company's sandwich business.

D. The Franchisee desires to participate in the use of the Company's rights in its service marks and trademarks in connection with the operation of one sandwich shop to be located at a site approved by the Company and the Franchisee.

E. The Franchisee understands that information received from the Company or from any of its officers, employees, agents or franchisees is confidential and has been developed with a great deal of effort and expense. The Franchisee acknowledges that the information is being made available to him so that he may more effectively establish and operate a sandwich shop.

F. The Company has granted, and will continue to grant to others, access to its recipes, formulas, food preparation procedures, business methods, business forms, business policies, body of knowledge pertaining to the operation of sandwich shops and information pertaining to new developments and techniques in its business.

G. The Company has and will continue to license others to use its service marks and trademarks in connection with the operation of sandwich shops at Company approved locations.

H. The Franchise Fee and Royalty constitute the sole consideration to the Company for the use by the Franchisee of its body of knowledge, systems and trademark rights.

I. The Franchisee acknowledges that he received the Company's franchise offering prospectus at or prior to the first personal meeting with a Company representative and at least ten (10) business days prior to the signing of this Agreement.

J. The Franchisee acknowledges that he understands that the success of the business to be operated by him under this Agreement depends primarily upon his efforts and that neither the Company or any of its agents or representatives have made any oral, written or visual representations or projections of actual or potential sales, earnings, net or gross profits.

AGREEMENT

Acknowledging the above recitals, the parties hereto agree as follows:

☒ 1. a. Upon execution of this Agreement, the Franchisee shall pay to the Company a Franchise Fee of $7,500.00 which shall not be refunded in any event; or

☐ b. Upon execution of this Agreement, the Franchisee shall pay to the Company a reduced Franchise Fee of $1,000.00 which shall not be refunded in any event. This reduction is being made available to the Franchisee in view of the fact that the Franchisee presently owns a franchise and all of his existing franchises are in full compliance with the Company's Operating Manual. In the event that the Franchisee is not in full compliance at the time a lease is executed for this franchise, the franchisee shall pay the Company the additional sum of $6,500.00

2. The Franchisee shall also pay to the Company, weekly, a Royalty equal to eight (8%) per cent of the gross sales from each sandwich shop which he operates throughout the term of this Agreement. "Gross sales" means all sales or revenues derived from the Franchisee's location exclusive of sales taxes.

3. The Company hereby grants to the Franchisee:

a. access to the Company's recipes, formulas, food preparation procedures, business methods, business forms, business policies and body of knowledge pertaining to the operation of a sandwich shop.

b. access to information pertaining to new developments and techniques in the Company's sandwich business.

c. license to use of the Company's rights in and to its service marks and trademarks in connection with the operation of one sandwich shop to be located at a site approved by the Company and the Franchisee.

4. The Company agrees to:

a. provide a training program for the operation of sandwich shops using the Company's recipes, formulas, food preparation procedures, business methods, business forms and business policies. The Franchisee shall pay all transportation, lodging and other expenses incurred in attending the program. The Franchisee must attend the training program before opening his store.

b. provide a Company Representative that the Franchisee may call upon for consultation concerning the operation of his business.

c. provide the Franchisee with a program of assistance which shall include periodic consultations with a Company Representative, publish a periodical advising of new developments and techniques in the Company's sandwich business, and grant access to home office personnel for consultations concerning the operation of his business.

5. The Franchisee agrees to:

a. begin operation of a sandwich shop within 365 days. The shop will be at a location found by the Franchisee and approved by the Company. The Company or one of its designees will lease the premises and sublet them to the Franchisee at cost. The Franchisee will then construct and equip his unit in accordance with Company specifications contained in the Operating Manual. Upon request, which shall not be unreasonably withheld, the Company will grant additional time to the Franchisee to begin operations. In all instances, the location of each unit must be approved by the Company and the Franchisee.

b. operate his business in compliance with applicable laws and governmental regulations. The Franchisee will obtain at his expense, and keep in force, any permits, licenses or other consents required for the leasing, construction or operation of his business. In addition, the

Franchisee shall operate his store in accordance with the Company's Operating Manual which may be amended from time to time as a result of experience, changes in the law or changes in the marketplace. The Franchisee shall refrain from conducting any business or selling any products other than those approved by the Company at the approved location.

c. be responsible for all costs of operating his unit including, but not limited to, advertising, taxes, insurance, food products, labor and utilities. Insurance shall include, but not be limited to, comprehensive liability insurance including products liability coverage in the minimum amount of $1,000,000. The Franchisee shall keep these policies in force for the mutual benefit of the parties. In addition, the Franchisee shall save the Company harmless from any claim of any type that arises in connection with the operation of his business.

d. refrain from engaging in any other business, directly or indirectly, during the term of this Agreement, identical with or similar to the business reasonably contemplated by this Agreement at any place except as a duly licensed franchisee of Doctor's Associates, Inc. In the event the Franchisee breaches this provision he shall pay to the Company $7,500.00 for each store opened in violation of this paragraph plus eight (8%) per cent of the gross sales of each store opened in violation of this subparagraph.

e. execute and deliver to the Company appropriate preauthorized check forms for his store's checking account prior to the opening of the sandwich shop so that the Company will be able to deposit the Royalty and Advertising Fund charges that accrue on a timely basis.

f. report his gross sales by telephone within two (2) days after the end of the business week (currently Tuesday) and submit written weekly summaries showing results of his operations by the following Saturday. If the

Franchisee fails to report his gross sales on a timely basis, the Company may estimate his sales. The Company will then deposit, into its account and the account of the Franchisee Advertising Fund, the Franchisee's preauthorized checks for the amounts due.

g. allow the Company's representatives or agents to enter his business premises during regular business hours to inspect and audit his business operations. For a period of three years, the Franchisee will keep all of the following on file at the store: cash register tapes, control sheets, weekly inventory sheets, deposit slips, bank statements and cancelled checks, sales and purchase records, business tax returns and accounting records. Also, the Franchisee hereby grants permission to the Company to examine all records of any supplier pertaining to his purchases.

h. reimburse the Company for the amount of the Royalties and Advertising Fund charges that would have been billed had his sales been reported accurately, plus interest on said amounts at the maximum legal rate in the jurisdiction in which the store is located, if it is found by the Company that the Franchisee has under-reported sales of his unit. In addition, if the amount of sales reported for any calendar year are less than ninety-eight (98%) per cent of the actual sales for that period, the Franchisee agrees to reimburse the Company for all costs of the investigation that uncovered the under-reported sales including salaries, travel, meals and lodging. In addition, the Franchisee will pay for all costs of the audit if his books and records are not produced at the time of audit provided that the Company gives five (5) days written notice of the audit prior to the scheduled date.

i. pay into the Franchisee Advertising Fund two and one-half (2½%) per cent of the gross sales of his sandwich shops. It is contemplated by the parties that the percentage payment may change in the future depending upon the prevailing market conditions and advertising requirements. However, it is agreed that no change in the percentage payment may be made without the approval of seventy-five (75%) per cent of the existing franchised units on the basis of one vote for each unit operating.

j. refrain from placing "For Sale" or similar signs at or in the general vicinity of the unit or using any words in any advertising denoting that the subject of a sale is a SUBWAY unit.

k. make prompt payment of all charges which are properly due in addition to the Royalty and Advertising Fund Payment.

6. Any relocation of the unit shall be made only upon the prior written approval of the Company. In the event the unit is relocated, the Franchisee will pay all expenses incidental to the termination of the lease and all moving expenses. If this Agreement is materially breached by the Franchisee, the Company or its designee may cancel the Sublease with the Franchisee upon such notice as is required in the Sublease.

7. The term of this Agreement shall be for a period of twenty (20) years from the date of its execution. The Franchisee shall have the option to extend the Agreement under the same terms and conditions for additional consecutive twenty (20) year periods if he gives the company written notice of his election to do so not less than one (1) year prior to the expiration of each twenty-year term.

8. a. Provided it gives the Franchisee written notice at least ten (10) days prior thereto, the Company may, at its option and without prejudice to any of its other rights or remedies provided for hereunder, terminate this Agreement if the Franchisee fails to pay any sums of money due the Company or one of its affiliates. The written notice shall specify the default and further provide that the Franchisee has ten (10) days from the date of delivery of the notice to remedy the default.

b. Provided it gives the Franchisee written notice at least ninety (90) days prior thereto, the Company may, at its option and without prejudice to any of its other rights or remedies provided for hereunder, terminate this Agreement in the following circumstances:

(1) the Franchisee does not substantially perform all of the terms and conditions of this Franchise Agreement not otherwise covered in Paragraph 8.a.;

(2) the Franchisee loses possession of the premises at which his store is located or fails to make rental payments on a timely basis;

(3) the Franchisee is guilty of any material misrepresentation in the reporting of gross sales that he is required to make to the Company. An understatement of gross sales in the amount of two (2%) per cent for a calendar year shall be deemed to be a material misrepresentation;

(4) the Franchisee makes an assignment for the benefit of his creditors or files a petition under Chapter 7 of the Bankruptcy Act;

(5) the Franchisee loses any permit or license which is a prerequisite to the operation of his unit.

The notice required under Subparagraph 8.b. shall specify the default and provide that the Franchisee has sixty (60) days in which to remedy the claimed deficiency. If the default is cured within sixty (60) days, the notice shall be void.

c. Upon termination of this Agreement, all of the Franchisee's rights hereunder shall terminate. The Franchisee shall forthwith discontinue use of all trade names, trademarks, service marks, signs, colors, structures, printed goods and forms of advertising indicative of the Company's sandwich business and return the Operating Manual to the Company. In the event of a breach of this provision, the Franchisee will be obligated to pay the Company $100.00 per day for each day he is in default.

d. In the event that the foregoing conditions under which the franchise can be terminated are violative of the laws of the State in which the Franchisee is operating his unit, the laws of that State relating to termination shall prevail.

e. In the event of a termination of the franchise, the Franchisee shall not be directly or indirectly associated as an employee, proprietor, stockholder, partner, agent or officer with or in the operation of any sandwich business within a radius of three (3) miles of an existing Company or franchised unit for a period of one (1) year. This provision also extends to locations in which a SUBWAY unit formerly existed within the previous year. In the event of a breach of this provision the Franchisee shall pay to the Company $7,500.00 for each store plus eight (8%) per cent of the gross sales of each store he is associated with within the restricted area during the one (1) year period.

9. The Franchisee's rights hereunder are transferable only as follows:

a. The Franchisee may sell his franchise and sandwich shop to a natural person, provided;

(1) the Franchisee first offers, in writing, to sell his franchised sandwich shop to the Company on the same terms and conditions as offered by a bona fide third party offeror and the Company fails to accept such offer for a period of thirty (30) days; and

(2) the purchaser has a satisfactory credit rating, is of good moral character, will comply with the Company's standard training requirements, has received the required disclosure documents in accordance with the Federal and State laws, rules and regulations and executes the then current Franchise Agreement being utilized by the Company; and

(3) all money obligations of the Franchisee to the Company and the Franchisee Advertising Fund are fully

paid and the Franchisee is not otherwise in default under this Agreement; and

(4) the Franchisee pays the Company $3,750.00 for its legal, accounting, training, and other expenses incurred in connection with the transfer.

b. The franchisee may assign his rights under this Agreement to a corporation without being relieved of any personal liability hereunder, provided:

(1) the corporation is newly organized and its activities are confined exclusively to operating the Franchisee's SUBWAY sandwich shop; and

(2) the Franchisee is, and, at all times remains, the owner of the controlling stock interest of the corporation; and

(3) the corporation agrees in writing to assume all of the Franchisee's obligations hereunder; and

(4) all stockholders of the corporation guarantee in writing the full and prompt payment and performance by the corporation of all its obligations to the Company pursuant to the assignment.

c. Upon the Franchisee's death his rights hereunder may pass to his next of kin or legatee provided such next of kin or legatee agrees in writing to assume the Franchisee's obligations hereunder and to attend the Company's next training session.

10. The parties also agree as follows:

a. The Franchisee is, and at all times during the term of this Agreement shall be, a natural person (not a corporation), an independent contractor and not an agent or employee of the Company.

b. If the Franchisee, for any reason, abandons, surrenders, or suffers revocation of all or any part of his rights and privileges under this Agreement, all such rights shall revert to the Company.

c. Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. The cost of such a proceeding will be borne equally by the parties.

d. In the event that the Franchisee withholds any monies due under this Agreement in the absence of a Court Order, or order of an Arbitrator selected in accordance with Paragraph 10.c, permitting the withholding of monies, the Company shall be reimbursed by the Franchisee for all reasonable costs that it incurs in pursuing the collection of the withheld monies. These costs shall include but not be limited to Arbitration fees, Court costs, attorneys' fees, management preparation time, witness fees, and travel expenses incurred by the Company.

e. No waiver by the Company of any default of the Franchisee shall constitute a waiver of any other default and shall not preclude the Company from thereafter requiring strict compliance with this Agreement.

f. Should any provision of this Agreement be construed or declared to be invalid, such decision shall not affect the validity of any remaining portion which shall remain in full force and effect as if this Agreement had been executed with such invalid portion eliminated.

g. This Agreement may be transferred and assigned by the Company and shall inure to the benefit of its successors and assigns.

h. No previous course of dealing or usage in the trade not specifically set forth in this Agreement shall be admissible to explain, modify or contradict this Agreement.

i. Whenever notice is required under the terms of this Agreement, the same shall be given in writing and sent by registered or certified mail. All such notices to the Franchisee shall be addressed to the store address or his home address.

j. The Company may charge interest on all past-due accounts of the Franchisee at the maximum legal rate in the jurisdiction in which the store is located.

k. In the event any of the Franchisor's service marks or trademarks are challenged by third parties claiming infringement of alleged prior or superior rights in such marks, the Franchisor shall have the option and right to modify or discontinue use of its service marks or trademarks and adopt substitute service marks or trademarks in the Franchisee's geographical business areas and in such other areas as the Franchisor chooses. The Franchisor's liability to the Franchisee under such circumstances shall be limited to the cost of replacement of the Franchisee's signs and advertising materials in effecting such modifications, discontinuance or adoption of substitute service marks or trademarks.

l. In the event the Franchisor is required to purchase the equipment and/or leasehold improvements of the Franchisee upon termination of this Agreement pursuant to the requirements of any Federal, State or local statute, rule or regulation or any judicial determination, the purchase price shall be computed at the Franchisee's cost less depreciation and amortization based upon a five (5) year life under the straight-line method.

m. In the event that this Agreement is wrongfully terminated by the Franchisee wherein he, or a successor, continues to operate in the sandwich business, he shall be additionally liable to the Franchisor for lost royalties based upon prospective sales of the unit, actual expenses incurred by the Franchisor to re-establish a franchise in the Franchisee's market area and for applicable development costs of the Franchisor's merchandising system misappropriated by the Franchisee.

n. In the event that the Company defaults in the performance of any term or condition of the Agreement, the Franchisee shall give the Company, by registered mail or certified mail, written notice within ninety (90) days of the occurrence of the default and shall specify therein the acts or omissions constituting the default. If the Company fails to cure the default within sixty (60) days after receipt of the notice, the Franchisee's obligations to make Royalty payments thereafter shall cease until the default is cured by the Company. Any default by the Company that occurred more than ninety (90) days prior to written notice thereof shall be deemed waived by the Franchisee.

11. All terms and words used in this Agreement, regardless of the number and gender in which they are used, shall be deemed and construed to include any other number, singular or plural, and any other gender, masculine, feminine, or neuter, as the context or sense of the Agreement or any section, paragraph or clause herein may require, as if such words had been fully and properly written in the appropriate number and gender.

12. This Agreement shall be governed by and construed in accordance with the laws of the State of Connecticut and contains the entire understanding of the parties. Other than the representations contained in the Agreement, the Offering Circular and advertising materials of the Franchisor, no other representations have been made to or relied on by the Franchisee except as set forth below:

_____

_____

_____

_____

13. Each of the parties hereto acknowledges that he has read and understands this Agreement and consents to be bound by all of its terms and conditions.

Signed & Sealed in the presence of:

DOCTOR'S ASSOCIATES, INC.

by /s/ Donald Fertman, Jr.
Duly Authorized

/s/ Paul S. Casarotto
Franchisee
PAUL S. CASAROTTO

[Filed in Montana Eighth Judicial District Court]

AMERICAN ARBITRATION ASSOCIATION

MEDIATION Please consult the applicable mediation rules regarding mediation procedures. If you want the AAA to contact the other party and attempt to arrange a mediation, please check this box. ☐

COMMERCIAL ARBITRATION RULES

DEMAND FOR ARBITRATION

Date: January 25, 1993

To:

Name Paul Casarotto

Address c/o Henry R. Crane, Tawney & Dayton, 607 SW Higgins Ave., P.O. Box 3658

City and State Missoula, MT 59806-3658

Telephone (406) 542-5000

Name of Representative Henry R. Crane, Tawney & Dayton

Representative's Address 607 SW Higgins Ave., P.O. Box 3658

City and State Missoula, MT 59806-3658

Telephone (406) 542-5000

The named claimant, a party to an arbitration agreement contained in a written contract, dated 4/25/88, providing for arbitration under the Commercial Arbitration Rules, hereby demands arbitration thereunder.

(Attach the arbitration clause or quote it hereunder.)

Hearing Locale Requested: Bridgeport, CT

Claim or Relief Sought: (amount, if any)

Type of Business: Claimant Franchisor Respondent Franchisee

Hearing Locale Requested: Bridgeport, CT

You are hereby notified that copies of our arbitration agreement and of this demand are being filed with the American Arbitration Association at its Hartford, CT office, with the request that it commence the administration of the arbitration. Under the rules, you may file an answering statement within ten days after notice from the administrator.

Signed Alan G. Schwartz Title Attorney

Name of Claimant Doctor's Associates, Inc.

Address (to be used in connection with this case) 3201 Commercial Blvd., Suite #116

City and State Ft. Lauderdale, FL 33309

Telephone (203) 877-4281 Fax (203) 876-6690

Name of Representative Alan G. Schwartz, Wiggin & Dana

Representative's Address One Century Tower

City and State New Haven, CT 06508-1832

Telephone (203) 498-4332 Fax (203) 782-2889

To institute proceedings, please send three copies of this demand with the administrative fee, as provided in the rules, to the AAA. Send the original demand to the respondent.

[Attached copy of arbitration clause.]

c. Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. The cost of such a proceeding will be borne equally by the parties.

[Attached copy of Nature of Dispute.]

Doctor's Associates, Inc. (DAI), hereby demands arbitration of the claims of a lawsuit brought in Montana state court by Paul Casarotto. DAI will be filing a motion to dismiss or in the alternative to stay the proceedings pending arbitration. Pursuant to a franchise agreement to which DAI and Paul Casarotto are parties, the claims are arbitrable.

MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

Cause No. BDV-92-860

PAUL CASAROTTO and PAMELA CASAROTTO,
Plaintiffs
v.

DANIEL L. and DEB HUDSON,
D&D SUBWAY CORPORATION, NICK LOMBARDI,
and DOCTOR'S ASSOCIATES, INC.,
Defendants

STATE OF CONNECTICUT)
) ss. Milford, Jan. 28, 1993
COUNTY OF NEW HAVEN)

AFFIDAVIT

I, LEONARD H. AXELROD, being duly sworn do hereby depose and say as follows:

1. My name is Leonard H. Axelrod and I reside at 27 Sherman Lane, Hamden, Connecticut. I am over the age of 18 years, understand the obligation of an oath, and have personal knowledge of the facts set forth herein.

2. I am Vice President of Doctor's Associates, Inc., the national franchisor of Subway sandwich shops.

3. Doctor's Associates, Inc. ("DAI") is a corporation organized and existing under the laws of the State of Florida and has been a Florida corporation since June of 1991.

4. The Florida address and the principal place of business for DAI is 3201 Commercial Boulevard, Suite #116, Ft. Lauderdale, FL 33309.

5. Before July 1991, DAI was a corporation organized under the laws of the State of Connecticut, with a principal place of business at 325 Bic Drive, Milford, CT 06460. On July 1, 1991, DAI of Florida merged with DAI of Connecticut, leaving DAI of Florida as the surviving corporation.

6. DAI has sold a total of over 8500 Subway franchises in the United States and estimates that there are approximately 7,400 stores in operation worldwide.

7. A franchise agreement to operate a Subway restaraunt contemplates a substantial amount of continuing interstate economic activity.

8. The franchise agreement essentially grants a franchisee a license to use nationally-known and federally-registered Subway trademarks and affords franchisees access to the benefits of national marketing performed by and on behalf of all franchisees.

9. A franchise agreement does not specify a particular location for a restaurant other than to designate the state in which the franchisee shall operate the restaurant.

10. In consideration for the license to use nationally-known trademarks, franchisees agree to pay a franchise fee and make weekly royalty payments to DAI based on a percentage of weekly gross sales.

11. To facilitate this procedure, franchisees agree to execute and deliver to DAI pre-authorized check forms to allow DAI to withdraw weekly royalties.

12. As well, franchisees agree to report weekly sales by telephone to Franchise World Headquarters, Inc., DAI's affiliate in Connecticut, and make available for DAI's inspection all business records of each store.

13. Franchisees also agree to make regular payments into a Franchisee Advertising Fund, whose board is composed of Subway franchisees, and that conducts a national marketing campaign on behalf of all franchisees.

14. Before a store is permitted to open, a franchisee is required to attend training by DAI in Connecticut to learn how to operate a Subway restaurant.

15. Under DAI's franchise agreements, franchisees maintain significant contact with DAI's offices in Florida and Connecticut and, in turn, benefit continually from DAI's expertise in franchising and national exposure.

16. Paul Casarotto, plaintiff in this action, entered into a franchise agreement with DAI on or about April 25, 1988. The Agreement was signed in Connecticut on behalf of DAI by Donald Fertman.

17. Under the terms of the Agreement, Casarotto agreed to attend training in Connecticut, report weekly sales to DAI in Connecticut, make weekly royalty payments to Connecticut, and make regular payments into the Franchisee Advertising Fund.

18. The Agreement permitted Casarotto to operate a Subway sandwich shop in Montana.

19. All parties to the Agreement agreed that any claims arising out of the Agreement would be arbitrated in accordance with ¶ 10(c) in Bridgeport, Connecticut.

20. Pursuant to the terms of the Agreements, Casarotto was required to maintain a substantial ongoing relationship with DAI in Milford, Connecticut and Ft. Lauderdale, Florida.

/s/ Leonard H. Axelrod
LEONARD H. AXELROD

[Jurat Omitted]

MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

Cause No. BDV-92-860

PAUL CASAROTTO and PAMELA CASAROTTO,
Plaintiffs,

v.

DANIEL L. and DEB HUDSON,
D&D SUBWAY CORPORATION, NICK LOMBARDI,
and DOCTOR'S ASSOCIATES, INC.,
Defendants.

STATE OF DELAWARE)
) ss.
COUNTY OF KENT)

AFFIDAVIT OF PAUL CASAROTTO

I, PAUL CASAROTTO, being duly sworn do hereby depose and say as follows:

1. I am one of the Plaintiffs in the above-entitled action and I am over the age of eighteen years.

2. In the early part of 1988, I contacted Doctor's Associates ("Doctors") in order to find out more about becoming a Subway franchisee.

3. That I received a return call from someone in Doctors concerning franchise purchases.

4. I was considering becoming a Subway franchisee in Great Falls, Montana.

5. I communicated telephonically with Doctors for a period of time during which Doctors explained the required process for becoming a franchisee.

6. That Doctors sent several documents to me at my home in Great Falls, Montana, including the Subway franchise agreement ("agreement").

7. Doctors told me that the agreement was a standard agreement and had to be signed as is, with no changes or modifications.

8. I read the agreement over before I signed it, however, no one ever told or explained to me that the agreement contained an arbitration clause or that the agreement was to be interpreted according to the laws of the State of Connecticut.

9. I signed the agreement on or about April 25, 1988 while I was visiting my mother in Albany, New York. This was the first standardized franchise agreement that I have ever signed.

10. I did not know that I was giving up my right to sue Doctors in Montana until my attorney, Robert Drummond told me in early 1992.

11. I did not have an attorney review the agreement for me prior to signing it.

12. The first time I spent any time with Doctor's personnel was in June, 1988, when I went to Connecticut for franchise training.

/s/ Paul Casarotto
PAUL CASAROTTO

[Jurat Omitted]